PROCUREMENT REVIEW PROCESS

A DESCRIPTIVE GUIDE

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PART I

Part I summarizes the basic features of the procurement review process at the Tribunal.

INTRODUCTION

The *North American Free Trade Agreement*[1] (NAFTA), the *Agreement on Internal Trade*[2] (the AIT) and the *Agreement on Government Procurement* (the AGP)[3] respectively require the signatories and the federal government of Canada to maintain an independent bid challenge authority. The *North American Free Trade Agreement Implementation Act*[4] establishes the Canadian International Trade Tribunal (the Tribunal) as the bid challenge (complaint) authority for Canada. Parliament has enacted legislation designed to ensure that the procurements covered by NAFTA, the AIT and/or the AGP are conducted in an open, fair and transparent manner and, wherever possible, in a way that maximizes competition. On occasion, a potential supplier may have reason to believe that a contract has been or is about to be awarded improperly or illegally, or that, in some way, it has been wrongfully denied a contract or an opportunity to compete for one. The Tribunal provides an opportunity for redress for potential suppliers concerned about the propriety of the procurement process relating to contracts covered by NAFTA, the AIT and the AGP.

BACKGROUND

• The AIT

As a Party to the AIT, the federal government has agreed to provide all Canadian suppliers equal access to federal government procurement for contracts involving specified classes of goods and services (including construction services) bought by 97 government departments and agencies and 7 Crown corporations listed in the AIT. Insofar as the federal government is concerned, the AIT applies to procurements with a value equal to or greater than $25,000, in cases where the largest portion of

1. Done at Ottawa, Ontario, on December 11 and 17, 1992, at Mexico, D.F., on December 14 and 17, 1992, and at Washington, D.C., on December 8 and 17, 1992 (in force for Canada on January 1, 1994).
2. As signed at Ottawa on July 18, 1994.
3. Done at Marrakesh on April 15, 1994 (in force for Canada on January 1, 1996).
4. S.C. 1993, c. 44.

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the procurement is for goods, and $100,000, in cases where the largest portion of the procurement is for services, including construction services contracts.

The AIT prohibits the federal government from discriminating against goods or services of a particular province or region and the suppliers of such goods or services and those of any other province or region. The AIT imposes procedural disciplines aimed at promoting equal access to procurement for all Canadian suppliers.

- **NAFTA**

As a Party to NAFTA, Canada has agreed to provide suppliers of the United States and Mexico equal opportunity to compete with Canadian suppliers for contracts involving specified classes of goods and services (including construction services) bought by 100 government departments and agencies and 11 government enterprises listed in NAFTA.

NAFTA applies to government procurements with a value equal to or greater than certain monetary thresholds. The monetary thresholds applicable to procurements by government departments and agencies are $80,900 for goods, services or any combination thereof and $10.5 million for construction services contracts. The monetary thresholds applicable to procurements by government enterprises are $404,600 for goods, services or any combination thereof and $12.9 million for construction services contracts. As between Canada and the United States, the monetary threshold for the procurement of goods by departments and agencies is $37,200. These thresholds are revised periodically in accordance with the indexation and conversion provisions in NAFTA.

NAFTA guarantees national treatment and non-discrimination to goods originating in Canada, the United States and Mexico, as well as to the suppliers of such goods and service suppliers in Canada, the United States and Mexico. NAFTA imposes procedural disciplines aimed at promoting transparency, predictability and competition in public sector procurements.

- **The AGP**

As a Party to the AGP, Canada has agreed to provide suppliers of the signatory countries equal opportunity to compete with Canadian suppliers for contracts involving specified classes of goods and services (including construction services) bought

by 100 government departments and agencies and government enterprises listed in the AGP.

The AGP applies to government procurements with a value equal to or greater than certain monetary thresholds. The monetary thresholds applicable to procurements by government departments and agencies are $261,200 for goods, services or any combination thereof and $10.0 million for construction services contracts. These thresholds are revised periodically in accordance with the provisions of the AGP.

The AGP guarantees national treatment and non-discrimination to goods originating in the country of the signatories, as well as to the suppliers of such goods and services. The AGP imposes procedural disciplines aimed at promoting transparency, predictability and competition in public sector procurements.

- **Regulations and Rules**

The Tribunal has detailed regulations and rules concerning the filing of a complaint (see Appendix 3), the procedure to follow before the Tribunal and the provision of time limits for the various steps in the review process. These regulations and rules have been published in both the Canada Gazette and Government Business Opportunities, the official publications for Canada for serving notices under NAFTA, the AIT and the AGP. These regulations and rules may be updated from time to time, and any resulting amendments will be published in the Canada Gazette. Potential suppliers will be expected to be aware of such amendments.

Readers are cautioned that the aim of this guide is to furnish the information necessary for a basic understanding of how the review process functions at the Tribunal. It is not complete in every detail. Excerpts from the relevant legislation are included at the end of this guide and should be read carefully prior to filing a complaint. While efforts will be made to keep this publication current, it may not always be possible to do so. The authorities for the statements made in this guide are in NAFTA, the AIT, the AGP, the *Canadian International Trade Tribunal Act* and the relevant regulations and rules.

DEFINITIONS

To facilitate the understanding of the review process at the Tribunal, the following definitions are provided:

"Act"
Canadian International Trade Tribunal Act

"AGP"
Agreement on Government Procurement

"AIT"
Agreement on Internal Trade

"Chairman"
Chairman of the Tribunal

"Complaint"
Complaint filed with the Tribunal

"Counsel"
Any person who acts in a proceeding on behalf of a party

"Counsel of record"
Counsel of record for a party as determined in accordance with the rules

"Designated contract"
Contract for the supply of goods or services that is designated by the regulations or that is of a class of contracts designated by the regulations

"GBO"
Government Business Opportunities

"Government institution"
Any department or ministry of state of the Government of Canada, or any other body or office, that is designated by the regulations

"Interested party"
Potential supplier or any person who has a material and direct interest in any matter that is the subject of a complaint

"Intervener"
Interested party that has been granted leave of the Tribunal to intervene in any proceedings in relation to a complaint

"Member"
Permanent member, temporary member or substitute member of the Tribunal

"Minister"
Minister of Finance

"NAFTA"
North American Free Trade Agreement, as defined in section 2 of the *North American Free Trade Agreement Implementation Act*

"OBS"
Open Bidding Service

"Prescribed"
Prescribed by regulations

"Potential supplier"
Bidder or prospective bidder on a designated contract

"Publication"
Publication set out in the Schedule of Canada in Sections A and B of Annex 1010.1 of NAFTA, in Appendix II of the AGP under Canada and/or as designated by Canada pursuant to Article 506.3 of the AIT

"Regulations"
Canadian International Trade Tribunal Procurement Inquiry Regulations

"Rules"
Canadian International Trade Tribunal Rules

"Send"
To transmit by hand or registered mail or by fax or other electronic means capable of producing for the recipient, at the destination, a printed copy of the document, information or notification

"Tribunal"
Canadian International Trade Tribunal

"Working day"
Day that is not a Saturday or a holiday

PROCUREMENT REVIEW — MANDATE OF THE TRIBUNAL

- **Mandate**

The Tribunal's mandate authorizes it to receive complaints pertaining to any aspect of the procurement process, conduct inquiries and make determinations.

The Tribunal's jurisdiction covers complaints under NAFTA, the AIT and the AGP. Complaints involving procurements falling outside NAFTA, the AIT or the AGP should be addressed to the responsible government institution or the appropriate court.

- **Role**

In dealing with a complaint, the Tribunal must determine whether the government institution responsible for the procurement under review has complied with the requirements of NAFTA, the AIT and/or the AGP and such other procedural requirements, as prescribed in the Regulations.

COMPLAINTS

- **Objections Directed to a Government Institution**

A potential supplier that has a problem with a procurement is encouraged to first contact the appropriate government institution. The fact that an objection is made to a government institution, and is thereafter dismissed or otherwise denied, does not prevent a potential supplier from making the same objection to the Tribunal, provided the requirements for filing and the time frames within which to file are observed.

- **Complaints Filed with the Tribunal**

Proceedings before the Tribunal are initiated by filing a complaint. To provide potential suppliers with maximum latitude in this regard, no special form is required. However, the complaint must contain certain information for it to be acceptable. These requirements are detailed below.

The procedure for filing a complaint with the Tribunal is simple and inexpensive. However, the retention of counsel by a complainant is permissible. Generally, a complaint must be filed with the Tribunal no later than 10 working days after the day on which the basis of the complaint became known or reasonably should have become known.

The Tribunal will acknowledge receipt of all complaints. When a complaint is properly filed with the Tribunal, the following sequence of events takes place.

- A copy of the complaint is sent by the Tribunal to the relevant government institution and the contract awardee, where applicable.

- Within five working days from the filing of the complaint, the Tribunal must decide whether or not to conduct an inquiry. In all cases, notices of inquiry are published in the Government Business Opportunities and the Canada Gazette.

- Within 25 days of receiving notification that a complaint has been filed with the Tribunal, the government institution responds by filing a Government Institution Report with the Tribunal, including a statement which fully addresses all the issues forming the basis of the complaint.

- After the Tribunal receives the statement, it sends a copy of it to the complainant and any interveners.

- Within seven days of being sent the statement, the complainant and any interveners may respond by providing the Tribunal with their comments on the statement.

- The Tribunal will send to the parties any comments that it receives on the statement.

- Concurrently with the above procedures, the Tribunal's investigative staff will conduct an investigation into the complaint. The results of this investigation will be set out in the Staff Investigation Report which, upon completion, will be put on the record and sent to the parties for comments. The parties' comments on the Staff Investigation Report will normally be filed with the Tribunal within five days from the time that the report was sent to the parties.

- All the information gathered during the above stages is submitted to the Tribunal. If the Tribunal considers that sufficient information exists to decide the case, it will proceed to make a determination.

- If the information is insufficient or disputed, the Tribunal, on its own initiative or at the request of a party, may order a hearing which may include a pre-hearing conference. Parties will be informed of these decisions and may be required to testify under oath or by affirmation. In these circumstances, a transcript of the proceedings will be made.

- Notwithstanding the above, the Tribunal may, at any stage of the proceedings, decide that the record is complete and proceed to make a determination on the complaint. A copy of the determination will be sent to the complainant, the government institution and any interveners. A copy of the determination will also be made available to other persons upon request. The Tribunal's decisions may be judicially reviewed by the Federal Court of Canada.

Who May Complain?

Any potential supplier (a bidder or prospective bidder) may file a complaint with the Tribunal on a designated contract.

What May be the Basis of a Complaint?

The Tribunal considers complaints against solicitations and awards or proposed awards on a designated contract. The contracts designated in the Regulations are those described in Chapter Ten of NAFTA, in Chapter Five of the AIT and in the AGP. A complaint may relate to any aspect of the procurement process and concern one or more of the procedural requirements contained in Chapter Ten of NAFTA, in Chapter Five of the AIT and/or in the AGP. For example, alleged restrictive specifications, omission of a required provision, ambiguous or indefinite evaluation factors, and inconsistent or mistaken application of evaluation criteria are some of the matters that may form the basis of a complaint.

There are some matters, however, that cannot form the basis of a complaint. Among them are the following.

Non-designated contracts

Any complaint relating to other than a designated contract.

Subcontract awards

Complaints against subcontract awards are generally not considered, except in very limited circumstances when the award is made by or for the government, such as when a contractor acts as a purchasing agent for the government.

Matters which, under the law, are to be determined by others

The Tribunal does not consider complaints involving matters which, under the law, are to be determined by others. For example, disputes over whether a firm meets the requirements of the Federal Contractors Program on Employment Equity are resolved by the Department of Human Resources Development.

Matters in court

The Tribunal will generally not make a determination on a complaint when the matter involved is the subject of litigation before a court that has proper jurisdiction or when the matter has been decided by such a court. However, if the court so requests, the Tribunal can make a determination on the complaint.

Contract performance

The Tribunal does not consider complaints involving performance of the contract, such as a contractor's entitlement to additional compensation or a government department's decision not to exercise its options.

Where to File a Complaint?

A complaint should be addressed to the Secretary of the Tribunal. It may be sent by mail, electronic means or courier, or delivered in person.

Form of Complaint

There is no prescribed form for filing a complaint. Formal briefs and other technical forms are not required. However, complaints must be made in writing. A complaint should be concise and logical. A complaint must contain the following information.

- The identity of the complainant, the designated contract concerned and the government institution that awarded or is to award the contract. The Tribunal needs this information in order to establish that the complainant is a potential supplier and that the complaint is in respect of a designated contract. This condition must be met before the complaint can be accepted for inquiry.

- A clear and detailed statement of the substantive (legal) and factual grounds of the complaint. The complaint must be organized in such a manner that a reader can understand, without further explanation, why the complaint is being made.

Events, which include times and dates, that led to the complaint should be provided. The provisions in NAFTA, the AIT and/or the AGP that have allegedly been violated should be identified. Facts which support any allegations should also be identified.

- A statement on the form of relief requested. This should include what the complainant would like to see happen if its complaint is determined to be valid.

- The address of the complainant to whom notices and other communications respecting the complaint may be sent.

- All information and documents relevant to the complaint that are in the complainant's possession. This may include the Request for Proposal or statement of work, any applicable correspondence and any other applicable documents.

Until this information is furnished, the Tribunal shall not regard the complaint to be filed. The Tribunal will inform the complainant when its complaint is not complete.

Confidential Information

Complainants should pay particular attention to identifying and properly organizing the public and confidential information that they submit to the Tribunal. In this regard, the Tribunal has adopted detailed and precise provisions which it will enforce dutifully.

If a party submits documents which contain information that the party wishes to keep confidential, the party must provide the Tribunal with:

- a statement identifying the information that the party wishes to keep confidential, together with an explanation as to why the information is confidential;

- a non-confidential summary of the confidential information, which should contain sufficient detail to convey a reasonable understanding of the substance of the confidential information (for example, a version of the information which blocks out the confidential information); and

- one set of documents containing the confidential information and marked "confidential" or "*confidentiel*" and one set of

documents from which the confidential information has been deleted.

Notice of Receipt and of Filing of a Complaint

A complaint received by the Tribunal is acknowledged to the complainant. Notification in writing of the filing of a complaint is also given.

TIME FOR FILING

The review process may delay the procurement or delivery of goods and services needed by the government. Therefore, in order to minimize the possible adverse impact of these delays, time limits for the resolution of complaints have been established. These time limits provide complainants with a reasonable opportunity to submit complaints. Under exceptional circumstances, the Tribunal may consider complaints that are not filed in a timely manner.

Generally, a potential supplier that files a complaint with the Tribunal must do so no later than 10 working days after the day on which the basis of the complaint became known or reasonably should have become known to the potential supplier.

If a potential supplier has made an objection to the relevant government institution, it may file a complaint with the Tribunal within 10 working days after the day on which it has actual or constructive knowledge of the denial of relief by that government institution, provided the objection was made to the government institution within the 10-working-day period mentioned in the preceding paragraph.

Where conditions exist that are beyond the control of the complainant or when, taking into consideration all the circumstances of the procurement, including the good faith of the potential supplier, a complaint raises an issue of a systemic nature, the Tribunal will consider any complaint not filed within the time limits set out above, provided such complaints are filed no later than 30 days after the day on which the basis of the complaint became known or reasonably should have become known to the potential supplier. When a complainant invokes reasons beyond its control, those reasons should be substantiated in the documentation submitted to the Tribunal.

- **Computing Time**

When computing a period of time set by the Tribunal, set out in the Rules or prescribed by the Regulations, the day on which the designated period of time begins shall not be counted, but the last day of the period shall be counted, unless that day is a Saturday or a holiday observed in the province in which a response or filing of documents is required to be made, in which event, the period shall include the next working day. When the period of time prescribed or allowed is eight days or less, any intervening Saturday or holiday shall not be counted.

- **Time Limit Extension**

The Tribunal may, where considerations of fairness require and exceptional circumstances exist, extend any time limit set out in the Rules. This, however, does not apply to the filing of a complaint. Under no circumstances will time limit extensions prolong the procurement review process beyond 135 days from the filing of a complaint.

- **Meaning of the Term "Filed"**

A complaint is considered to have been filed on the day on which the Tribunal receives such complaint, provided that it complies with the requirements of the Act or, if the complaint is deficient, on the day that the Tribunal receives the information that corrects the deficiencies.

Reports and documents are considered to have been filed on the day on which the Tribunal receives them. The mailing date of reports and documents postmarked by the Canadian, U.S., Mexican and any other signatory postal services shall be the date printed on the postmark. Postmarks affixed by postage meters will not be accepted as evidence of the date of mailing. The sending date of a telegram is the date of first transmission by the telegraph company, and the date placed on a telegram by the telegraph company shall be presumed to establish the date of first transmission. The date of a facsimile will be the date and time of the transmission as received in full by the Tribunal's facsimile machine.

- **Late Filing of Documents**

A determination on a complaint shall not be delayed by the failure of a party to file a submission within the prescribed time limits, and the failure of any party to comply with the prescribed time limits may result in the resolution of the complaint without the Tribunal's consideration of the late submission.

EXPRESS OPTION

It may be important to have a complaint decided in less than the normal time limit of 90 days. The Rules, therefore, provide for an accelerated procedure known as the express option. Any party may request the use of the express option, but such a request must be made in writing and submitted to the Tribunal no later than 3 days from the filing of the complaint. The Tribunal will decide within 2 days of receiving the request whether the case is suitable for the express option, taking into consideration the reasons for the request, the complexity of the case and the workload of the Tribunal. When the express option is used, the normal time limits for submission of the various reports and comments and the issuance of the Tribunal's determination are compressed. Under the express option, the Government Institution Report must be filed within 10 days of the government institution being notified by the Tribunal that the express option will be used. The complainant's and intervener's comments on the Government Institution Report must be filed with the Tribunal within 5 days of the report being sent to the complainant by the Tribunal, and the Tribunal's determination must be issued within 45 days of the filing of the complaint.

DISMISSAL OF COMPLAINT

The Tribunal may dismiss a complaint at any time where:

- the complaint has no valid basis;
- the complaint is not in respect of a procurement by a government institution;
- the complaint is not filed within the time limits set out in the Regulations or Rules; or
- the complainant has failed to file any information required by the Tribunal.

REVIEW PROCESS

• General

The review process is initiated when a complaint is filed with the Tribunal. The sequence of events detailed earlier describe the full inquiry process. The extent to which the entire process is employed, including the pre-hearing conference and the hearing itself, depends on the degree to which each step is necessary to provide the Tribunal with sufficient information to make a determination.

- **Pre-Hearing Conference**

A pre-hearing conference may be held at the discretion of the Tribunal, or on request by the complainant, the relevant government institution or an intervener. The conference will serve to clarify issues and factual situations and provide a better understanding of each party's position. The conference does not involve formal procedures such as transcripts, sworn testimony and cross-examination. All parties will be invited to attend.

- **Hearing**

A hearing involves more formal procedures. Witnesses may be called upon to testify under oath or by affirmation, and a transcript of the proceedings is made. A hearing may be held for various reasons, including the need to resolve a specific factual dispute that is essential to the resolution of the complaint and that cannot be otherwise resolved on the written record. If any party refuses to attend such a hearing or a witness fails to answer a relevant question, the Tribunal may draw an inference that is unfavourable to the party refusing to cooperate and may take whatever additional action is available to it as a superior court of record. A hearing should be requested as early as possible during the review process.

PROTECTION OF CONFIDENTIAL INFORMATION

For all cases, a public record is constructed by the Tribunal and made available for viewing on the Tribunal's premises. Further, all parties can expect that copies of the public documentation that they submit to the Tribunal will be provided by the Tribunal to the other parties to the proceedings. The Tribunal will furnish a copy of the documentation, except to the extent that the withholding of information is permitted or required by law.

If a party submits documents which contain information that the party wishes to keep confidential, the party must provide the Tribunal with:

- a statement identifying the information that the party wishes to keep confidential, together with an explanation as to why the information is confidential;

- a non-confidential summary of the confidential information, which should contain sufficient detail to convey a reasonable understanding of the substance of the confidential information (for example, a version of the information which blocks out the confidential information); and

- one set of documents containing the confidential information and marked "confidential" or "*confidentiel*" and one set of documents from which the confidential information has been deleted.

EFFECT OF COMPLAINTS ON AWARD AND PERFORMANCE

When the government institution responsible for the procurement is notified that a complaint has been filed prior to contract award, the government institution may be ordered by the Tribunal to postpone any award until the resolution of the complaint. If, however, the government institution certifies in writing to the Tribunal within the prescribed time limit that the procurement is urgent or that delaying the award would be contrary to the public interest, the Tribunal must rescind such an order. Nevertheless, the inquiry will continue. The Tribunal does not have the power to delay the performance of any contract awarded.

DETERMINATION

Consistent with due process, the Tribunal may issue its determination at any time during the review process.

The Tribunal will decide whether or not a complaint is valid. When a complaint is valid, the Tribunal may recommend appropriate remedies in the form of awards and recommendations. Recommendations are to be implemented to the greatest extent possible by the relevant government institution.

PART II

Part II sets out excerpts from the relevant legislation governing bid challenges. Should the complete text of any of the legislation contained herein be required, the short title and reference to the legislative source of the relevant documents follows.

Canadian International Trade Tribunal Act, R.S.C. 1985, c. 47 (4th Supp.)
Canadian International Trade Tribunal Procurement Inquiry Regulations (unofficial consolidation)
Canadian International Trade Tribunal Rules, SOR/91-499, SOR/93-601

SHORT TITLE

1. This Act may be cited as the *Canadian International Trade Tribunal Act*.

INTERPRETATION

2. (1) In this Act,

"Chairman" means the Chairman of the Tribunal;

"member" means a permanent member, temporary member or substitute member of the Tribunal;

"Minister" means the Minister of Finance;

"prescribed" means prescribed by regulations;

"Tribunal" means the Canadian International Trade Tribunal established by subsection 3(1).

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Establishment of Tribunal

3. (1) There is hereby established a tribunal, to be known as the Canadian International Trade Tribunal, consisting, subject to subsection (2), of a Chairman, two Vice-Chairmen and not more than six other permanent members to be appointed by the Governor in Council.

(2) In addition to the members who may be appointed under subsection (1), the Governor in Council may, whenever in the opinion of the Governor in Council the workload of the Tribunal so requires, appoint temporary members of the Tribunal on such terms and conditions as the Governor in Council may specify, but the number of temporary members holding office shall not at any time exceed five.

Head Office, Sittings and Quorum

13. Subject to subsections 30.11(3), 38(2) and 39(2), three members constitute a quorum of the Tribunal and any three or more members have and may exercise all of the Tribunal's powers and have and may perform all of the Tribunal's duties and functions.

Powers, Duties and Functions

16. The duties and functions of the Tribunal are to
(*b*.1) receive complaints, conduct inquiries and make determinations under sections 30.1 to 30.19;
(*d*) exercise and perform such other duties or functions that, pursuant to any other Act of Parliament or regulations thereunder, shall or may be exercised or performed by the Tribunal.

17. (1) The Tribunal is a court of record and shall have an official seal, which shall be judicially noticed.

(2) The Tribunal has, as regards the attendance, swearing and examination of witnesses, the production and inspection of documents, the enforcement of its orders and other matters necessary or proper for the due exercise of its jurisdiction, all such powers, rights and privileges as are vested in a superior court of record.

COMPLAINTS BY POTENTIAL SUPPLIERS

30.1 In this section and in sections 30.11 to 30.19,

"complaint" means a complaint filed with the Tribunal under subsection 30.11(1);

"designated contract" means a contract for the supply of goods or services that has been or is proposed to be awarded by a government institution and that is designated or of a class of contracts designated by the regulations;

"government institution" means any department or ministry of state of the Government of Canada, or any other body or office, that is designated by the regulations;

"interested party" means a potential supplier or any person who has a material and direct interest in any matter that is the subject of a complaint;

"potential supplier" means, subject to any regulations made under paragraph 40(*f*.1), a bidder or prospective bidder on a designated contract.

30.11 (1) Subject to the regulations, a potential supplier may file a complaint with the Tribunal concerning any aspect of the procurement process that relates to a designated contract and request the Tribunal to conduct an inquiry into the complaint.

(2) A complaint must
(*a*) be in writing;
(*b*) identify the complainant, the designated contract concerned and the government institution that awarded or proposed to award the contract;
(*c*) contain a clear and detailed statement of the substantive and factual grounds of the complaint;
(*d*) state the form of relief requested;
(*e*) set out the address of the complainant to which notices and other communications respecting the complaint may be sent;
(*f*) include all information and documents relevant to the complaint that are in the complainant's possession;
(*g*) be accompanied by any additional information and documents required by the rules; and
(*h*) be accompanied by the fees required by the regulations.

(3) The President may assign one member of the Tribunal to deal with a complaint and a member so assigned has and may exercise all of the Tribunal's powers, and has and may perform all of the Tribunal's duties and functions, in relation to the complaint.

30.12 (1) The Tribunal shall notify the complainant in writing of the receipt of the complaint.

(2) Where the Tribunal determines that a complaint does not comply with subsection 30.11(2), it shall notify the complainant in writing and specify the deficiencies to be corrected, the corrective action required and the period within which the action must be taken.

(3) Where the Tribunal determines that a complaint complies with subsection 30.11(2), it shall notify, in writing, the complainant, the relevant government institution and any other party that the Tribunal considers to be an interested party.

30.13 (1) Subject to the regulations, after the Tribunal determines that a complaint complies with subsection 30.11(2), it shall decide whether to conduct an inquiry into the complaint, which inquiry may include a hearing.

(2) Where the Tribunal decides to conduct an inquiry, it shall notify, in writing, the complainant, the relevant government institution and any other party that the Tribunal considers to be an interested party and give them an opportunity to make representations to the Tribunal with respect to the complaint.

(3) Where the Tribunal decides to conduct an inquiry into a complaint that concerns a designated contract proposed to be awarded by a government institution, the Tribunal may order the government institution to postpone the awarding of the contract until the Tribunal determines the validity of the complaint.

(4) The Tribunal shall rescind an order made under subsection (3) if, within the prescribed period after the order is made, the government institution certifies in writing that the procurement of the goods or services to which the designated contract relates is urgent or that a delay in awarding the contract would be contrary to the public interest.

(5) The Tribunal may decide not to conduct an inquiry into a complaint or decide to cease conducting an inquiry if it is of the opinion that the complaint is trivial, frivolous or vexatious or is not made in good faith, and where the Tribunal so decides, it shall notify, in writing, the complainant, the relevant government institution and any other party that the Tribunal considers to be an interested party of that decision and the reasons therefor.

30.14 (1) In conducting an inquiry, the Tribunal shall limit its considerations to the subject-matter of the complaint.

(2) At the conclusion of an inquiry, the Tribunal shall determine whether the complaint is valid on the basis of whether the procedures and other requirements prescribed in respect of the designated contract, or the class of contracts to which it belongs, have been or are being observed.

30.15 (1) Where the Tribunal decides to conduct an inquiry, it shall, within the prescribed period after the complaint is filed, provide the complainant, the relevant government institution and any other party that the Tribunal considers to be an interested party with the Tribunal's findings and recommendations, if any.

(2) Subject to the regulations, where the Tribunal determines that a complaint is valid, it may recommend such remedy as it considers appropriate, including any one or more of the following remedies:

(*a*) that a new solicitation for the designated contract be issued;
(*b*) that the bids be re-evaluated;
(*c*) that the designated contract be terminated;
(*d*) that the designated contract be awarded to the complainant; or
(*e*) that the complainant be compensated by an amount specified by the Tribunal.

(3) The Tribunal shall, in recommending an appropriate remedy under subsection (2), consider all the circumstances relevant to the procurement of the goods or services to which the designated contract relates, including

(*a*) the seriousness of any deficiency in the procurement process found by the Tribunal;
(*b*) the degree to which the complainant and all other interested parties were prejudiced;
(*c*) the degree to which the integrity and efficiency of the competitive procurement system was prejudiced;
(*d*) whether the parties acted in good faith; and
(*e*) the extent to which the contract was performed.

(4) Subject to the regulations, the Tribunal may award to the complainant the reasonable costs incurred by the complainant in preparing a response to the solicitation for the designated contract.

30.16 (1) Subject to the regulations, the Tribunal may award costs of, and incidental to, any proceedings before it in relation to a complaint on a final or interim basis and the costs may be fixed at a sum certain or may be taxed.

(2) Subject to the regulations, the Tribunal may direct by whom and to whom any costs are to be paid and by whom they are to be taxed and allowed.

30.17 An interested party may, with leave of the Tribunal, intervene in any proceedings before the Tribunal in relation to a complaint.

30.18 (1) Where the Tribunal makes recommendations to a government institution under section 30.15, the government institution shall, subject to the regulations, implement the recommendations to the greatest extent possible.

(2) Within the prescribed period, the government institution shall advise the Tribunal in writing of the extent to which it intends to implement the recommendations and, if it does not intend to implement them fully, the reasons for not doing so.

(3) Where the government institution has advised the Tribunal that it intends to implement the recommendations in whole or in part, it shall further advise the Tribunal in writing, within the prescribed period, of the extent to which it has then implemented the recommendations.

30.19 (1) The Tribunal may provide the deputy head of a government institution with its comments and observations on any matter that the Tribunal considers should be brought to the attention of the deputy head in connection with the procurement process.

(2) In subsection (1), "deputy head" means
(*a*) where the government institution is a department or ministry of state, the person having by law the status of deputy head; and
(*b*) where the government institution is any other body or an office, the chief executive officer of that body or the person holding that office.

GENERAL

Procedural Matters

31. All parties to a hearing before the Tribunal may appear in person or may be represented at the hearing by counsel or an agent.

32. A hearing before the Tribunal may, on the request of any party to the hearing, be held *in camera* if that party establishes to the satisfaction of the Tribunal that the circumstances of the case so require.

34. For the purpose of any inquiry under this Act or the *Special Import Measures Act*, the Tribunal may obtain information that in its judgment is authentic, otherwise than under the sanction of an oath or affirmation, and use and act on the information.

35. Hearings before the Tribunal shall be conducted as informally and expeditiously as the circumstances and considerations of fairness permit.

36. Every person summoned to attend before the Tribunal shall receive the like fees and allowances for so doing as if summoned to attend before the Federal Court.

37. The Tribunal shall cause notice of its decision in any proceedings held by it pursuant to any other Act of Parliament to be published forthwith in the *Canada Gazette*.

By-Laws, Rules and Regulations

39. (1) The Tribunal may, after consultation with the Minister and with the approval of the Governor in Council, make rules, not inconsistent with this or any other Act of Parliament,

(*a*) respecting the sittings of the Tribunal;

(*b*) for the purpose of ensuring that a conflict of interest will not be created by reason of the assignment of any member to sit at hearings of the Tribunal or to hear, determine and deal with a matter before the Tribunal and generally for the prevention of conflicts of interest;

(*c*) specifying any additional information that shall accompany a complaint filed under any of subsections 23(1) to (1.1), 30.01(2) and 30.11(1); and

(*d*) generally, governing the proceedings, practice and procedures of the Tribunal.

(2) A majority of the permanent members in office shall constitute a quorum for the purpose of making rules under subsection (1).

40. The Governor in Council may make regulations

(*a*) respecting the matters to be addressed or examined by the Tribunal in an inquiry commenced under subsection 26(1) or 30.01(4);

(*c*) defining the expression "other interested party" for the purposes of section 25, 26, 28, 29, 30 or 30.01;

(*d*) defining the expression "procurement process" for the purposes of this Act;

(*e*) designating departments, ministries of state, bodies or offices for the purposes of the definition "government institution" in section 30.1;

(*f*) designating contracts or classes of contracts for the purposes of the definition "designated contract" in section 30.1;

(*g*) respecting the filing of complaints under subsection 30.11(1), including any conditions that must be met before a complaint may be filed and the time within which and manner in which it must be filed;

(*h*) requiring fees to be paid on the filing of a complaint under subsection 30.11(1) and prescribing those fees or the manner of determining those fees;

(*i*) respecting the conditions that must be met before the Tribunal may begin an inquiry into a complaint filed under subsection 30.11(1) and the matters to be addressed or examined by the Tribunal in the inquiry;

(*j*) prescribing, for the purposes of subsection 30.14(2), the procedures and other requirements to be observed in respect of any contract or class of contracts;

(*k*) respecting the recommendations and orders that the Tribunal may make under section 30.15 and the extent, if any, to which a government institution must implement the Tribunal's recommendations pursuant to section 30.18;

(*l*) respecting the awarding of costs by the Tribunal under section 30.16, including the maximum amount that may be awarded in relation to any item of costs, and determining by whom and to whom any costs are to be paid and by whom they are to be taxed and allowed;

(*m*) prescribing any other matter or thing that, by this Act, is to be or may be prescribed; and

(*n*) generally, for carrying out the purposes and provisions of this Act.

Disclosure of Information

43. In sections 44 to 49, "information" includes evidence.

44. Where information is provided to the Tribunal for the purposes of any proceedings before the Tribunal, every party to the proceedings has, unless the information is information to which subsection 45(1) applies, a right, on request, to examine the information during the normal business hours of the Tribunal and a right, on payment of the prescribed fee, to be provided with copies of any such information that is in documentary form or in any other form in which it may be readily and accurately copied.

45. (1) Where a person designates information as confidential pursuant to paragraph 46(1)(*a*) and that designation is not withdrawn by that person, no member and no person employed in the public service of Canada who comes into possession of that information while holding that office or being so employed shall, either before or after ceasing to hold that office or being so employed, knowingly disclose that information, or knowingly allow it to be disclosed, to any other person in any manner that is calculated or likely to make it available for the use of any business competitor or rival of any person to whose business or affairs the information relates.

(2) Subsection (1) does not apply in respect of any summary of information or statement referred to in paragraph 46(1)(*b*).

(3) Notwithstanding subsection (1), information to which that subsection applies that has been provided to the Tribunal in any proceedings before the Tribunal may be disclosed by the Tribunal to counsel for any party to those proceedings or to other proceedings arising out of those proceedings for use by that counsel only in those proceedings, subject to such conditions as the Tribunal considers are reasonably necessary or desirable to ensure that the information will not, without the written consent of the person who provided the information to the Tribunal, be disclosed by counsel to any person in any manner that is calculated or likely to make it available to

(*a*) any party to the proceedings or other proceedings, including a party who is represented by that counsel; or

(*b*) any business competitor or rival of any person to whose business or affairs the information relates.

(4) In subsection (3), "counsel", in relation to a party to proceedings, includes any person, other than a director, servant or employee of the party, who acts in the proceedings on behalf of the party.

46. (1) Where a person who provides information to the Tribunal for the purposes of proceedings before the Tribunal wishes some or all of the information to be kept confidential, the person shall submit to the Tribunal, at the time the information is provided,

(*a*) a statement designating as confidential the information that the person wishes to be kept confidential, together with an explanation as to why that information is designated as confidential; and

(*b*) a summary of the information designated as confidential pursuant to paragraph (*a*) in sufficient detail to convey a reasonable understanding of the substance of the information or a statement

(i) that such a summary cannot be made, or

(ii) that such a summary would disclose facts that the person has a proper reason for wishing to keep confidential,

together with an explanation that justifies the making of the statement.

(2) A person who designates information as confidential pursuant to paragraph (1)(*a*) fails to comply with paragraph (1)(*b*) where

(*a*) the person provides neither the summary nor the statement referred to in paragraph (1)(*b*);

(*b*) the person provides a summary of the information designated as confidential pursuant to paragraph (1)(*a*), but the Tribunal is satisfied that the summary does not comply with paragraph (1)(*b*);

(*c*) the person provides a statement referred to in paragraph (1)(*b*), but does not provide an explanation that justifies the making of the statement; or

(*d*) the person provides a statement referred to in paragraph (1)(*b*), but the Tribunal is satisfied that the explanation given as justification for the making of the statement does not justify the making thereof.

47. (1) Where a person has designated information as confidential pursuant to paragraph 46(1)(*a*) and the Tribunal considers that such a designation is warranted, but the person has failed to comply with paragraph 46(1)(*b*), the Tribunal shall cause the person to be informed of the failure, of the ground on which the person has so failed and of the application of subsection 48(3) if the person fails to take, within the time limited therefor by or pursuant to that subsection, such action as is necessary for the person to take in order to comply with paragraph 46(1)(*b*).

(2) Where a person has designated information as confidential pursuant to paragraph 46(1)(*a*) and the Tribunal considers that, by reason of its nature, extent or availability from other sources or of the failure of the person to provide any explanation as to why it was designated as confidential, the designation of that information as confidential is unwarranted, the Tribunal shall cause the person

(*a*) to be notified of the fact that the Tribunal considers the designation to be unwarranted and of its reasons for so considering; and

(*b*) where the person has failed to comply with paragraph 46(1)(*b*), to be informed as provided in subsection (1).

48. (1) Where a person is notified pursuant to paragraph 47(2)(*a*) with respect to any information that the person has designated as confidential pursuant to paragraph 46(1)(*a*), the person may, within fifteen days after being so notified,

(*a*) withdraw the designation, or

(*b*) submit to the Tribunal an explanation or further explanation as to why the information was designated as confidential

and, where the person does neither of those things within those fifteen days, that information shall not thereafter be taken into account by the Tribunal in the proceedings for the purposes for which it was provided, unless the Tribunal obtains that information from a source other than that person.

(2) Where, pursuant to subsection (1), a person submits to the Tribunal, within the fifteen days referred to in that subsection, an explanation or further explanation as to why the information was designated as confidential, the Tribunal shall again consider whether, taking into account that explanation or further explanation, the designation of the information as confidential is warranted and, if it decides that it is not warranted, shall cause the person to be notified that the information will not thereafter be taken into account by the Tribunal in the proceedings for the purposes for which it was provided, in which case the information shall not thereafter be taken into account by the Tribunal in those proceedings, unless the Tribunal obtains the information from a source other than that person.

(3) Subject to subsection (4), where a person who has been informed pursuant to section 47 that the person has failed to comply with paragraph 46(1)(*b*) with respect to any information does not, within fifteen days after being so informed or within such longer time not exceeding thirty days after being so informed as the Tribunal, either before or after the expiration of the fifteen days, in its discretion allows, take such action as is necessary for the person to take in order to comply with paragraph 46(1)(*b*), the Tribunal shall cause the person to be notified that the information will not thereafter be taken into account by the Tribunal in the proceedings for the purposes for which it was provided, in which case the information shall not thereafter be taken into account by the Tribunal in those proceedings, unless the Tribunal obtains the information from a source other than that person.

(4) Subsection (3) does not apply in respect of any information that the Tribunal is prohibited by subsection (1) or (2) from taking into account in the proceedings for the purposes for which the information was provided.

49. Where

(*a*) information given or elicited in the course of any proceedings before the Tribunal is, in the opinion of the Tribunal, in its nature confidential,

the information shall not knowingly be disclosed by any member or person employed in the public service of Canada who comes into possession of the information in any manner that is calculated or likely to make it available for the use of any business competitor or rival of any person to whose business or affairs the information relates.

REGULATIONS RESPECTING CANADIAN INTERNATIONAL TRADE TRIBUNAL INQUIRIES INTO POTENTIAL SUPPLIERS' COMPLAINTS CONCERNING GOVERNMENT PROCUREMENT*

Short Title

1. These Regulations may be cited as the *Canadian International Trade Tribunal Procurement Inquiry Regulations*.

Interpretation

2. In these Regulations,

"Act" means the *Canadian International Trade Tribunal Act*; (*Loi*)

"Agreement on Government Procurement" means the Agreement on Government Procurement as found in Annex 4 of the World Trade Organization Agreement; (*Accord sur les marchés publics*)

"Agreement on Internal Trade" means the *Agreement on Internal Trade* published in the *Canada Gazette* Part I, on April 29, 1995; (*Accord sur le commerce intérieur*)

"NAFTA" means North American Free Trade Agreement as defined in subsection 2(1) of the *North American Free Trade Agreement Implementation Act*; (*ALÉNA*)

"working day" means a day that is not a Saturday or a holiday. (*jour ouvrable*)

Designations

3. (1) For the purposes of the definition "designated contract" in section 30.1 of the Act, any contract or class of contract concerning a procurement of goods or services or any combination of goods or services, as described in Article 1001 of NAFTA, in Article 502 of the Agreement on Internal Trade or in Article I of the Agreement on Government Procurement, by a government institution, is a designated contract.

(2) For the purposes of the definition "government institution" in section 30.1 of the Act, the following are designated as government institutions:

(*a*) the federal government entities set out in the Schedule of Canada in Annex 1001.1a-1 of NAFTA, under the heading "CANADA" in Annex 502.1A of the Agreement on Internal Trade or under the heading "CANADA" in Annex 1 of the Agreement on Government Procurement;

(*b*) the government enterprises set out in the Schedule of Canada in Annex 1001.1a-2 of NAFTA or under the heading "CANADA" in Annex 3 of the Agreement on Government Procurement;

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* The underlined portions of the Regulations represent amendments made as a result of the bringing into force of the *Agreement on Internal Trade* and the *Agreement on Government Procurement*.

(*c*) any provincial government entities that may be set out in Annex 1001.1a-3 of NAFTA or under the heading "CANADA" in Annex 2 of the Agreement on Government Procurement; and
(*d*) where a procurement that results in the award of a designated contract by a government entity or enterprise referred to in paragraph (*a*), (*b*) or (*c*) is conducted by the Department of Supply and Services or its successor.

Application

4. These Regulations apply to complaints by potential suppliers concerning designated contracts.

Determination of the Value of a Contract

5. Where the Tribunal requires that the value of a designated contract be determined, the Tribunal shall deem that value to be the value of the designated contract that was established by the government institution
(*a*) where a notice of proposed procurement was published in accordance with one or more of NAFTA, the Agreement on Internal Trade and the Agreement on Government Procurement, at the time it was published; or
(*b*) where a notice of proposed procurement has not been published, at the time the solicitation documentation was made available to potential suppliers.

Time Limits for Filing a Complaint

6. (1) Subject to subsections (2) and (3), a potential supplier who files a complaint with the Tribunal in accordance with section 30.11 of the Act shall do so not later than 10 working days after the day on which the basis of the complaint became known or reasonably should have become known to the potential supplier.

(2) A potential supplier who has made an objection regarding a procurement relating to a designated contract to the relevant government institution, and is denied relief by that government institution, may file a complaint with the Tribunal within 10 working days after the day on which the potential supplier has actual or constructive knowledge of the denial of relief, if the objection was made within 10 working days after the day on which its basis became known or reasonably should have become known to the potential supplier.

(3) A potential supplier who fails to file a complaint within the time limit set out in subsection (1) or (2) may file a complaint within the time limit set out in subsection (4), if the Tribunal determines, after considering all of the circumstances surrounding the procurement, including the good faith of the potential supplier, that
(*a*) the failure to file the complaint was attributable to a cause beyond the control of the potential supplier at the time the complaint should have been filed in order to meet the requirements of subsection (1) and (2); or

(*b*) the complaint concerns any aspect of the procurement process, of a systemic nature, relating to a designated contract, and compliance with one or more of Chapter Ten of NAFTA, Chapter Five of the Agreement on Internal Trade and the Agreement on Government Procurement.

(4) A complaint under subsection (3) may not be filed later than 30 days after the day the basis of the complaint became known or reasonably should have become known to the potential supplier.

Conditions for Inquiry

7. (1) The Tribunal shall, within five working days after the day on which a complaint is filed, determine whether the following conditions are met in respect of the complaint:

(*a*) the complainant is a potential supplier;

(*b*) the complaint is in respect of a designated contract; and

(*c*) the information provided by the complainant, and any other information examined by the Tribunal in respect of the complaint, discloses a reasonable indication that the procurement has not been carried out in accordance with whichever one of Chapter Ten of NAFTA, Chapter Five of the Agreement on Internal Trade or the Agreement on Government Procurement applies.

(2) Where the Tribunal determines that the conditions set out in subsection (1) in respect of a complaint have been met and it decides to conduct an inquiry, the Tribunal shall publish a notice of the filing of the complaint in a circular or periodical designated by the Treasury Board.

Interim Reports

8. (1) Where the Tribunal produces or causes to be produced an interim report or similar document in respect of the complaint it shall, before making any order, finding or recommendation in respect of the complaint, provide a copy of the interim report or similar document to the complainant, the relevant government institution or any interested parties.

(2) A complainant, relevant government institution or any other interested party may make representations to the Tribunal on any aspect of the report or similar document referred to in subsection (3) that is not confidential information.

Postponement of Award of Contract

9. (1) Where the Tribunal, in accordance with subsection 30.13(3) of the Act, orders the government institution to postpone the awarding of a designated contract, it shall, within five working days after the making of the order, notify the government institution of that order.

(2) The Tribunal shall rescind an order made under subsection 30.13(3) of the Act, if, within seven working days after the day on which the order is made, the government institution provides a certificate referred to in subsection 30.13(4) of the Act in respect of the designated contract.

Dismissal of Complaints

10. The Tribunal may, at any time, order the dismissal of a complaint where
(*a*) after taking into consideration the Act, these Regulations and, as applicable, NAFTA, the Agreement on Internal Trade or the Agreement on Government Procurement, the Tribunal determines that the complaint has no valid basis;
(*b*) the complaint is not in respect of a procurement by a government institution;
(*c*) the complaint is not filed within the time limits set out in these Regulations or in any rules made pursuant to subsection 39(1) of the Act; or
(*d*) the complainant has failed to file any information required by the Tribunal.

Determination

11. Where the Tribunal conducts an inquiry into a complaint, it shall determine whether the procurement was conducted in accordance with the requirements set out in whichever one of NAFTA, the Agreement on Internal Trade or the Agreement on Government Procurement applies.

Issuance of Findings and Recommendations

12. The Tribunal shall issue its findings and recommendations in respect of a complaint to the complainant, the relevant government institution and any other party that the Tribunal considers to be an interested party
(*a*) subject to paragraphs (*b*) and (*c*), within 90 days after the filing of the complaint;
(*b*) where, under any rules made pursuant to subsection 39(1) of the Act, the Tribunal grants a request for an express option, within 45 days after it grants that request; or
(*c*) where, under any rules made pursuant to subsection 39(1) of the Act, the Tribunal authorizes an extension of time, within 135 days after the filing of the complaint.

13. Where the Tribunal makes recommendations to a government institution under section 30.15 of the Act, the government institution shall:
(a) advise the Tribunal in writing, within 20 days after receipt of the recommendations, of the extent to which it intends to implement the recommendations and, if it does not intend to implement them fully, the reasons for not doing so; and
(b) where the government institution has advised the Tribunal that it intends to implement the recommendations in whole or in part, advise the Tribunal in writing, within 60 days after receipt of the recommendations, of the extent to which it has then implemented the recommendations.

RULES GOVERNING THE PROCEEDINGS, PRACTICE AND PROCEDURES OF THE CANADIAN INTERNATIONAL TRADE TRIBUNAL

Short Title

1. These Rules may be cited as the *Canadian International Trade Tribunal Rules*.

Definitions

2. In these Rules,

"Act" means the *Canadian International Trade Tribunal Act*; (Loi)

"counsel" includes any person who acts in a proceeding on behalf of a party; (*avocat*)

"counsel of record" means the counsel of record for a party as determined in accordance with rule 11; (*avocat inscrit au dossier*)

"fax" means to transmit a facsimile of printed matter electronically, or a document so transmitted; (*télécopie*)

"Form" means a Form set out in the schedule; (*formule*)

"intervener" means a person who
(*c*) is an interested party that has been granted leave of the Tribunal to intervene in any proceedings in relation to a complaint pursuant to section 30.17 of the Act; (*intervenant*)

"party" means
(*c*.1) in the case of a complaint under subsection 30.11(1) of the Act, the complainant, the government institution or an intervener; (*partie*)

"proceeding" includes an appeal, re-hearing, reference, inquiry, recommencement of inquiry, review, request for a ruling, reconsideration of an order or finding, complaint filed by a domestic producer or any other proceeding before the Tribunal under the Act or under any other Act of Parliament or regulations made thereunder; (*procédure*)

"Secretary" means the Secretary of the Tribunal, and includes any other officer or employee of the Tribunal during any period that the officer or employee is authorized to act as Secretary. (*secrétaire*)

Interpretation

3. These Rules shall be liberally construed to secure the fairest, least expensive and most expeditious determination of every proceeding, in accordance with section 35 of the Act.

PART I

RULES OF GENERAL APPLICATION

Application

4. Except where the context otherwise requires, this Part applies to all proceedings before the Tribunal.

Directions on Procedure

5. Where, in any proceeding, a question of procedure arises to which these Rules do not provide an answer, or the answer they do provide is incomplete, the question shall be disposed of, consistently with such, if any, of these Rules as are applicable, in such manner as the Tribunal directs.

Dispensing with or Varying Procedure

6. For the purpose of any proceeding the Tribunal may, in order to avoid an injustice to any party to the proceeding or if the parties to the proceeding consent, dispense with, vary or supplement any of these Rules.

Defect in Form and Irregularity

7. No proceeding is invalid by reason of a defect in form or a technical irregularity.

Extending or Abridging Time Limits

8. The Tribunal may extend or abridge the time limits fixed by these Rules or otherwise fixed by the Tribunal either before or after the expiration of the time limits fixed.

Computation of Time

9. Unless otherwise provided, the computation of time under these Rules or a direction of the Tribunal is governed by sections 26 to 28 of the *Interpretation Act*.

Counsel of Record

11. (1) A counsel who signs a document filed pursuant to these Rules on behalf of any party shall be the counsel of record for the party commencing on the date of filing and continuing until a change, if any, is made in accordance with subrule (2).

(2) A party in a proceeding may change the party's counsel of record by
(*a*) filing with the Tribunal a Notice of Change of counsel of record signed by the new counsel;
(*b*) serving a copy of the Notice on the former counsel and every other party in the proceeding; and
(*c*) filing with the Tribunal proof of service of the Notice.

Filing of Documents

12. (1) Subject to rule 17 and in addition to the provisions of the *Excise Tax Act* in respect of appeals under Part VII of that Act, each document required or permitted by these Rules to be filed shall be filed by sending by mail or by fax, or by hand delivery, to the Secretary

(*b*) in the case of an inquiry under Part XI, the original and three copies of the document.

(2) In addition to the number of copies mentioned in subrule (1), the parties shall file any additional number of copies that may be specified by the Secretary where the Tribunal is of the opinion that the special circumstances of a proceeding so require.

(3) A document that is filed by fax shall include a cover page setting out the following information:

(*a*) the name, address and telephone number of the sender;

(*b*) the date and time of the transmission;

(*c*) the total number of pages transmitted, including the cover page; and

(*d*) the name, address and telephone number of a person to contact if transmission problems occur.

(4) Notwithstanding subrules (1) and (2), where a document is filed by fax, only one copy of the document may be sent by fax if the original of the document and the required number of copies are sent forthwith to the Secretary by mail.

(5) Where the original of a document filed by fax is received, the Secretary shall substitute the original document for the fax.

(6) The date of filing of a document shall be considered to be

(*a*) where the document is filed by mail, the earliest postal date appearing on the envelope containing the document;

(*b*) where the document is filed by fax, the date of transmission; and

(*c*) where the document is filed by hand delivery, the date stamped by the Secretary on receipt of the document.

(7) In the absence of any proof of the date of mailing or of transmission by fax of a document, the date shown by the date received stamp placed on the document by the Secretary shall be considered to be the date of filing of the document.

(8) Any document that is filed with the Tribunal may, with the consent of the Tribunal and on such terms and conditions, if any, as are fixed by the Tribunal, be amended at any time by the party by which it was filed.

Service of Documents

13. (1) Subject to rule 17 and in addition to the provisions of the *Excise Tax Act* in respect of appeals under Part VII of that Act, the following rules apply to the service of documents:

(*a*) no document is required to be served personally, unless personal service of the document is required pursuant to these Rules or a direction of the Tribunal; and

(*b*) a document that is not required to be served personally may be served at the address for service of the party.

(2) Where a document is required to be served personally, the service shall be made

(*a*) on an individual, by leaving a copy of the document with the individual;

(*b*) on a corporation, by leaving a copy of the document with an officer, director or agent of the corporation, or with a person at any place of business of the corporation who appears to be in control or management of the place of business; and

(*c*) in any other case, in such manner as the Tribunal may direct.

(3) The address for service of a party shall be

(*a*) where there is a counsel of record for a party, the business address of the counsel as shown on the most recent document filed by the counsel that shows the counsel's address; and

(*b*) where there is no counsel of record

(i) in the case of the Minister of National Revenue or the Deputy Minister, the Office of the Deputy Attorney General of Canada in Ottawa, or

(ii) in the case of any other party, the address of the party as shown on the most recent document filed by the party that shows the party's address.

(4) Service of a document at an address for service shall be made

(*a*) by sending the document by registered mail or by fax to the address for service; or

(*b*) by leaving the document at the address for service.

(5) A document that is served by fax shall include a cover page setting out the following information:

(*a*) the name, address and telephone number of the sender;

(*b*) the name of the person to be served;

(*c*) the date and time of the transmission;

(*d*) the total number of pages transmitted, including the cover page; and

(*e*) the name, address and telephone number of a person to contact if transmission problems occur.

(6) In the absence of proof to the contrary, the date of service of a document shall be considered to be

(*a*) where the document is served personally or by leaving it at the address for service, the date of delivery;

(*b*) where the document is served by registered mail, the date that is five days after the earliest postal date appearing on the envelope containing the document; and

(*c*) where the document is served by fax, the date of transmission.

(7) Where any document is required by these Rules or by direction of the Tribunal to be served by any party, proof of service shall be filed with the Tribunal forthwith after service of the document.

(8) Proof of service of any document shall be made by showing
(*a*) an acknowledgment of service signed by or on behalf of the person served;
(*b*) an affidavit of service stating the name of the person who served the document and the date, place and manner of service; or
(*c*) in the case of service by registered mail, an affidavit by the person mailing the document, stating the date of mailing and to which is attached a receipt signed by the person served.

Submission of Confidential Information

15. Where a person who provides information to the Tribunal for the purposes of any proceeding wishes some or all of the information to be kept confidential, the person shall file with the Tribunal, in addition to the documents referred to in paragraphs 46(1)(*a*) and (*b*) of the Act, two separate sets of documents in the following manner:
(*a*) one set of documents containing the confidential information and marked "confidential" or "confidentiel" on the top of each page that contains confidential information; and
(*b*) one set of documents from which the confidential information has been deleted.

Disclosure of Confidential Information to Counsel

16. (1) A counsel for a party to a proceeding who wishes access to confidential information provided to the Tribunal for the purposes of the proceeding, other than a director, servant or employee of the party, shall file with the Tribunal a Declaration and Undertaking in Form III.

(2) After the filing by a counsel of a Declaration and Undertaking referred to in subrule (1), the Tribunal shall cause the counsel to be notified, in the manner that it considers appropriate in the circumstances, of its decision to grant access and, if access is not granted, it shall serve on the counsel a notification in writing setting out the reasons why access is not granted.

(3) Where the Tribunal decides not to give access to confidential information to a counsel, that counsel is not entitled to receive or to examine any confidential information provided to, or to be present when any confidential information is provided orally to, the Tribunal.

Filing, Service and Communication of Confidential Information

17. (1) A document containing confidential information shall be served only on the Tribunal.

(2) Where a counsel has been granted access to confidential information, the counsel shall not, unless authorized by the Tribunal,
(*a*) communicate the confidential information by fax, including for filing or serving that information; or
(*b*) communicate the confidential information by telephone.

Pre-hearing Conference

18. (1) At the same time as giving a notice of a hearing to be held in any proceeding or at any time after the giving of that notice, the Tribunal may direct that all parties to the proceeding or their counsels appear before the Tribunal or before a member thereof or the Secretary, at a time and place fixed by the Tribunal, for a pre-hearing conference for the purpose of making representations to the Tribunal or receiving guidance from the Tribunal with respect to any of the following matters that the Tribunal specifies:

(*a*) the clarification and simplification of issues;

(*b*) the procedure to be followed at the hearing;

(*c*) the mutual exchange between parties to the proceeding of written submissions, exhibits and other material presented or to be presented to the Tribunal;

(*d*) the question of whether any written submission, other document or testimony presented or proposed to be presented to the Tribunal contains confidential information;

(*e*) the question of the confidential information, if any, to which a person who is to appear on behalf of a party in the capacity of an expert on any matter should be given access; and

(*f*) any other matter with respect to which a discussion or decision before the hearing would, in the opinion of the Tribunal, aid in the expeditious presentation of evidence or otherwise be conducive to the orderly conduct of the hearing.

(2) Counsel for any party to a proceeding may, if notice of a hearing has been given in the proceeding, make a written request to the Tribunal to direct that a pre-hearing conference be held to consider any matter referred in subrule (1).

(3) On receipt of a request pursuant to subrule (2), the Tribunal may direct that a pre-hearing conference be held as requested unless it determines that a pre-hearing conference on the matter would not assist in the orderly conduct of the hearing.

(4) Subject to paragraph 17(2)(*b*), where all parties to a pre-hearing conference consent or where the Tribunal so directs, the Tribunal may conduct the pre-hearing conference by telephone conference call or in any other manner that affords the parties or their counsel an opportunity to participate.

(5) Following a pre-hearing conference, the Tribunal may issue an order setting out its ruling with respect to the matters considered at the conference.

Availability of Information

19. (1) The Tribunal shall, prior to or at the commencement of a hearing in a proceeding, make available to each party or the party's counsel all of the information that has been provided to the Tribunal for the purposes of the proceeding and that has not been designated as confidential.

(2) The Tribunal shall, prior to or at the commencement of a hearing in a proceeding, make all confidential information that has been provided to the Tribunal for the purposes of the proceeding available to each counsel who has filed a Declaration and Undertaking and who has been granted access to the confidential information.

Subpoenas

20. (1) The Tribunal may, on its own initiative or at the request of any party, summon before it by subpoena any person to attend a hearing and require that person to give evidence on oath or affirmation and to produce documents or other things.

(2) A subpoena may be in Form IV and shall be issued by the Secretary without charge.

(3) A subpoena shall be served on the witness personally and, at the time of service, an amount that is not less than the amount to which the witness would have been entitled as fees and allowances if the subpoena had been issued pursuant to Rule 333 of the *Federal Court Rules* shall be paid or tendered to the witness.

(4) Where a subpoena issued pursuant to this rule is served on a person, the original copy of the subpoena shall be filed with the Tribunal forthwith after service, together with proof of service on the person.

Witnesses

21. (1) Subject to section 34 of the Act and unless these Rules provide otherwise, witnesses at a hearing shall be examined orally on oath or affirmation and the examination may consist of direct examination, cross-examination and re-examination.

(2) A party who intends to call an expert witness at a hearing shall, not less than 10 days before the commencement of the hearing, file with the Secretary and serve on the other parties a report, signed by the expert witness, setting out the expert witness' name, address and qualifications and the substance of the expert witness' testimony.

(3) A party on whom a copy of a report described in subrule (2) has been served and who wishes to rebut with expert evidence any matter set out in the report shall, not less than five days before the commencement of the hearing, file with the Secretary a statement setting out the evidence to be introduced in rebuttal and serve a copy of the statement on the other parties.

Evidence

22. Where the Tribunal holds a hearing in any proceeding, the Tribunal may give whatever weight is appropriate to any written submission or other document filed in the proceeding as evidence, if the party who filed the document is not present at the hearing to testify with respect to, or does not make available to the Tribunal testimony with respect to, the matters set out in the document.

Hearings in Camera

23. Where, in any proceeding, the Tribunal directs a hearing or a portion thereof to be held *in camera* for the purpose of receiving confidential information, the hearing or portion thereof may be attended only by

(*a*) the person who is to present confidential information to the Tribunal at the hearing;

(*b*) a person that a person referred to in paragraph (*a*) requests be permitted to attend the hearing;

(*c*) counsel for a party to the proceeding who has filed with the Tribunal a Declaration and Undertaking and who has been granted access to the confidential information;

(*d*) officers and employees of the Tribunal who have been directed to attend; and

(*e*) any other persons that the Tribunal authorizes to attend.

Notice of Motion

24. (1) Any matter that arises in the course of a proceeding and that requires a decision or order of the Tribunal shall be brought before the Tribunal by notice of motion.

(2) A notice of motion shall be in writing and may be in any form that contains a clear and concise statement of the facts, the decision or order sought and the grounds for seeking the decision or order.

(3) A notice of motion given by a party shall be filed with the Secretary and served on the parties not less than three days before the day fixed for the commencement of the hearing.

(4) Any party who wishes to answer a notice of motion shall file a written answer with the Secretary and serve a copy of it on the other parties.

(5) Where a party wishes to submit a document in support of a notice of motion or answer, the document shall accompany the notice or answer in question and the party shall file it with the Secretary and serve a copy of it on the other parties.

(6) Unless the Tribunal directs otherwise, a decision or order on a notice of motion shall be made in writing.

(7) Notwithstanding subrules (2) to (5), a notice of motion in connection with a matter that has not come to the attention of a party prior to the commencement of a hearing may be given orally at the hearing and shall be disposed of in accordance with such procedure as the Tribunal may direct.

Procedures where Hearing not Required

25. (1) Where, in any matter, a hearing is not required and the Tribunal intends not to proceed by way of a hearing, the Tribunal may

(*a*) dispose of the matter on the basis of the written documentation before it;

(*b*) require further information to be furnished by any party; or

(*c*) invite submissions from any party or any person who may have an interest in the matter and issue directions on procedure.

(2) Where the Tribunal intends not to proceed by way of a hearing, the Tribunal shall issue a public notice informing the parties and any person who may have an interest in the proceeding of its intention and inviting them to make submissions as to whether a hearing should be held or not.

(3) Where the Tribunal invites submissions from parties and interested persons, the Tribunal shall afford them with an opportunity to review the submissions made by other parties or interested persons and to file a reply.

(4) Submissions from parties and interested persons shall be filed with the Secretary and served on all other parties.

(5) Notwithstanding that the Tribunal has invited submissions pursuant to this rule, the Tribunal may determine that the matter shall be disposed of by means of a hearing.

Adjournments and Postponements of Hearing

26. (1) At any time during a hearing, the Tribunal may, on its own initiative or at the request of any party, adjourn a hearing on such terms, if any, as are just.

(2) The Tribunal may postpone a hearing in a proceeding
(*a*) on its own initiative for any reason; or
(*b*) at the request of a party made to the Tribunal not later than 10 days before the day fixed for the commencement of the hearing, where the other parties consent thereto or where it would be appropriate to delay the hearing until the decision has been rendered in another case before the Tribunal or before any other court in Canada in which the issue is the same or substantially the same as the issue to be raised in the proceeding.

Communication of Information

27. Any person who wishes to communicate with the Tribunal, to obtain information in respect of the procedure followed by the Tribunal, or to inspect documents, exhibits or other material provided to the Tribunal, shall apply to the Secretary.

Decisions, Orders or Findings of the Tribunal

28. (1) Where the Tribunal makes a decision, declaration, order, finding or other final ruling in any proceeding, the Secretary shall, forthwith after it is made, send by hand or registered mail a copy of the decision, declaration, order, finding or ruling to each person who is a party to the proceeding and to each person who was provided with the Notice of Commencement of Inquiry, Notice of Review, Notice of Request for a Ruling, Notice of Reconsideration, Notice of Inquiry or other notice of commencement of the proceedings, as the case may be.

(2) The Secretary shall, forthwith after the making of a decision, declaration, order, finding or other final ruling by the Tribunal in a proceeding, cause a notice thereof to be published in the *Canada Gazette*.

Failure to Comply

29. Where a party to a proceeding has not met any requirement of these Rules or complied with any order or direction issued by the Tribunal, the Tribunal may

(*a*) stay the proceeding until it is satisfied that the requirement has been met or the order or direction has been complied with; or

(*b*) make such order as it considers appropriate.

PART XI

INQUIRIES INTO PROCUREMENT COMPLAINTS BY POTENTIAL SUPPLIERS

Interpretation

93. In this Part

"send", in respect of any document, information or notification, means to transmit by hand or registered mail or by fax or other electronic means capable of producing for the recipient, at the destination, a printed copy of the document, information or notification; (*envoyer*)

"working day" means a day that is not a Saturday or a holiday. (*jour ouvrable*)

Application

94. This Part applies to inquiries into complaints made by potential suppliers under subsection 30.11(1) of the Act.

Computation of Time

95. In this Part where anything is to be done within eight days or less, any day within that period that is not a working day shall not be counted.

Day of Filing of Complaints

96. (1) A complaint shall be considered to have been filed
(*a*) on the day it was received by the Tribunal; or
(*b*) in the case of a complaint that does not comply with subsection 30.11(2) of the Act, on the day that the Tribunal receives the information that corrects the deficiencies in order that the complaint comply with that subsection.

(2) Subrule 12(6) does not apply to this Rule.

Receipt of a Complaint

97. Where the Tribunal receives a complaint, the Secretary shall forthwith send a notification in writing to the complainant of the receipt of the complaint.

Notice of Filing of a Complaint

98. Where the Tribunal determines that a complaint complies with subsection 30.11(2) of the Act, the Secretary shall forthwith send a notification in writing of the filing of the complaint to the complainant, the government institution and any other party that the Tribunal considers to be an interested party.

Deficient Complaint

99. (1) Where the Tribunal determines that a complaint does not comply with subsection 30.11(2) of the Act, the Secretary shall forthwith send a notification in writing to the complainant to that effect and which notice specifies the deficiencies to be corrected, the corrective action required and the period determined by the Tribunal within which the corrective action must be taken.

(2) Where the corrective action referred to in subrule (1) has been taken, and the Tribunal determines that the complaint complies with subsection 30.11(2) of the Act, the Secretary shall forthwith send a notification in writing of the filing of the complaint to the complainant, the government institution and any other party that the Tribunal considers to be an interested party.

Transmission of Complaint

100. (1) The Secretary shall send a copy of the complaint to the person designated in the solicitation documentation by the government institution to receive complaints in respect of the procurement.

(2) Where no person has been designated in the solicitation documentation to receive complaints, the Secretary shall send the documents referred to in subrule (1)

(*a*) in the case of a government institution that is a department or ministry of state, to the deputy head; and

(*b*) in any other case, to the chief executive officer of the appropriate body.

Notification of Inquiry

101. Where the Tribunal decides to conduct an inquiry, the Secretary shall forthwith send a notification in writing to the complainant, the government institution and any other party that the Tribunal considers to be an interested party.

Exchange of Information

102. (1) Where a designated contract that is the subject of a complaint has been awarded, the government institution shall forthwith, upon receipt of the complaint, send a notification in writing to the Tribunal that states

(*a*) the name and address of the contractor to whom the designated contract was awarded; and

(*b*) if known by the government institution, the name of a representative of the contractor.

(2) The Secretary shall forthwith send a copy of the complaint to the contractor referred to in subrule (1).

(3) Subject to Rule 16, the Secretary shall forthwith send a copy of every document that the Tribunal has received from the contractor referred to in subrule (1) to the government institution, the complainant and all interveners.

Government Institution Report

103. (1) Subject to subrule 107(5), a government institution shall file a report with the Tribunal not later than 25 days after it has received the documents referred to in Rule 100.

(2) A report referred to in subrule (1) shall contain a copy of the following:
(*a*) the complaint;
(*b*) the solicitation, including the specifications or portions thereof relevant to the complaint;
(*c*) all other documents relevant to the complaint;
(*d*) a statement that sets out all findings, actions and recommendations of the government institution and responds fully to all allegations of the complaint; and
(*e*) any additional evidence or information that may be necessary in order to resolve the complaint.

(3) The Secretary shall, forthwith after receiving a report referred to in subrule (1),
(*a*) send to the complainant a copy of the statement referred to in paragraph (2)(*d*) and of the documents referred to in paragraph (2)(*c*), except any documents that the complainant is not otherwise authorized by law to receive; and
(*b*) make available to all interveners a copy of the material referred to in paragraph (*a*).

(4) The government institution may, within the time limits set out in subrule (1) request from the Tribunal, in writing, an extension of the time limit referred to in that subrule and shall set out in the request the reasons therefor.

(5) The Tribunal shall determine, in writing, whether the specific circumstances of the complaint warrant an extension of the time limit for the submission of the report and, where appropriate, may set a new date for the submission of the report.

Filing Comments on the Government Institution Report

104. (1) Subject to subrule 107(5), the complainant shall, within seven days after the day on which the Tribunal sends a copy of the statement to the complainant pursuant to subrule 103(3), file with the Tribunal comments on that statement or a request that the case be decided on the existing record.

(2) The Tribunal shall, forthwith after receiving the comments referred to in subrule (1), send a copy thereof to the government institution and all interveners.

(3) On the request of the complainant filed within the time limit referred to in subrule (1) and where the specific circumstances of the complaint warrant an extension of that time limit, the Tribunal may extend the time limit for the filing of the comments referred to in that subrule.

Hearing

105. (1) The Tribunal may, on the request of the complainant or on the Tribunal's own initiative, hold a hearing on the merits of a complaint.

(2) A request for a hearing shall be made at the earliest possible time in the complaint proceeding.

(3) A hearing shall be held on a date and at a time and place set by the Tribunal and the Secretary shall send notice thereof to all parties.

(4) The date referred to in subrule (3) shall be not earlier than seven days after the report of the government institution is filed with the Tribunal.

(5) The complainant, the government institution and all interveners may file comments with the Tribunal in respect of the complaint at the hearing.

(6) The Tribunal may request that a hearing be held if at any time during the proceeding it decides that a hearing is needed in order to clarify material issues.

106. (1) All parties to a hearing may appear in person or may be represented at the hearing by counsel or by an agent.

(2) Subject to subrule (3), a hearing before the Tribunal shall be held in public.

(3) The Tribunal may, on its own initiative, hold a hearing *in camera* or may hold the hearing *in camera* on the request of any party to the complaint, where the party establishes that the circumstances of the procurement justify an *in camera* hearing.

(4) Only those persons who are referred to in Rule 23 may attend an *in camera* hearing.

(5) Subrule 25(2) does not apply to this Part.

Express Option

107. (1) Where the complainant, the government institution or any intervener requests an expeditious determination on a complaint, the Tribunal shall consider the feasibility of using the procedure set out in subrule (5), referred to herein as the "express option".

(2) The Tribunal may apply the express option in the case of any complaint that is suitable for resolution within 45 days after it is filed.

(3) A request for the express option shall be made in writing and shall be submitted to the Secretary not later than three days after the complaint is filed.

(4) The Tribunal shall determine whether to apply the express option within two days after receiving a request therefor and shall notify the government institution, the complainant and all interveners if the express option is to be applied.

(5) Where the express option is applied, the time limits set out in this Part for filing documents shall not apply and the following procedure shall be followed:

(*a*) the government institution shall, within 10 days after the day on which it is notified by the Tribunal that the express option is to be applied, file with the Tribunal a report on the complaint containing the material referred to in subrule 103(2);

(*b*) the Secretary shall, forthwith after receiving a report referred to in paragraph (*a*), send to the complainant a copy of the documents referred to in paragraph 103(3)(*a*) and make a copy of that material available to all interveners;

(*c*) the complainant and an intervener shall, within five days after the day on which the Secretary sends the statement of the government institution referred to in paragraph 103(2)(*d*) to the complainant pursuant to paragraph (*b*), file with the Secretary comments on that statement or a request that the case be decided on the existing record;

(*d*) the Secretary shall, forthwith after receiving the comments referred to in paragraph (*c*), send a copy thereof to the government institution and all interveners; and

(*e*) the Tribunal shall issue a determination on the complaint within 45 days after the day on which the complaint is filed.

Service of Documents

108. Where, in any proceedings under this Part a document is required by these Rules to be served, the Secretary shall effect that service.

BID CHALLENGE	
SCHEDULE OF EVENTS IN A 90-DAY INQUIRY	
DAY*	**ACTION**
1	The Tribunal is satisfied that the complaint is properly filed Notice of filing sent to the parties.
6	Complaint accepted for inquiry.
8 - 12	Notice of Inquiry published in Canada Gazette and Government Business Opportunities.
25	Government Institution Report received by Tribunal. Sent to parties for comments.
32	Parties' comments on the Government Institution Report sent to the Tribunal and forwarded to the parties.
40 - 55	Staff Investigation Report filed on the record and sent to all parties for comments.
60	Comments on the Staff Investigation Report received by the Tribunal.
62	File hearing sent to the Tribunal.
75	Pre-hearing conference and oral hearing as required.
90	Determination of the Tribunal in the language of the complainant.

* Days are approximate.

BID CHALLENGE	
SCHEDULE OF EVENTS IN A 45-DAY INQUIRY (EXPRESS OPTION)	
DAY*	**ACTION**
1	The Tribunal is satisfied that the complaint is properly filed. Notice of filing sent to the parties.
4	Request for express option by parties.
6	Complaint accepted for inquiry. Express option granted and parties notified.
8 - 12	Notice of Inquiry published in Canada Gazette and Government Business Opportunities.
16	Government Institution Report received by Tribunal. Sent to parties for comments.
21	Parties' comments on the Government Institution Report sent to the Tribunal and forwarded to the parties.
30	Staff Investigation Report filed on the record and sent to all parties for comments.
33 - 35	Comments on the Staff Investigation Report received by the Tribunal.
37	File hearing sent to the Tribunal.
or 30 - 35	Pre-hearing conference and oral hearing as required.
45	Determination of the Tribunal in the language of the complainant.

* Days are approximate.

CHECKLIST

IDENTITY OF COMPLAINANT

- Company
- Address
- Telephone number
- Facsimile number
- Contact/representative and address

INFORMATION ON DESIGNATED CONTRACT

- Solicitation or file number
- Contract number
- Estimated value
- Product or service being procured
- Federal Supply Classification (FSC) code, if known

IDENTITY OF GOVERNMENT INSTITUTION

ELEMENTS OF THE COMPLAINT

Statement of complaint
- all events and facts in support of complaint
- relevant times and dates
- provision of the AGP, the AIT and NAFTA that has been breached

Statement of form of relief requested
- costs
- disposition of solicitation

Inclusion of all relevant information and documents
- Request for Proposal or statement of work
- correspondence
- record of communications